

**BEFORE THE
FEDERAL COMMUNICATION COMMISSION
Washington, D.C. 20554**

In the Matter of

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**Rules and Regulations Implementing the
Telephone Consumer Protection Act of
1991**

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CG Docket No. 02-278

COMMENTS OF THE TENNESSEE REGULATORY AUTHORITY

I. Introduction

The Tennessee Regulatory Authority (“TRA”) files these comments with the Federal Communications Commission (“FCC”) in response to the Further Notice of Proposed Rulemaking (FCC 02-278). These comments will show how the FCC, the Federal Trade Commission (“FTC”), and the states can coordinate the operation and enforcement of their respective Do-Not-Call (“DNC”) programs.

This harmonization process can be illustrated like the building of a wheel. The implementation and operation phase can be looked at as being the rolling of the wheel down the road until it reaches its destination of success. The FCC is presently in the building of the wheel phase of a federal DNC program. The TRA asserts that building a wheel that will roll smoothly requires proper balancing. The spokes of the wheel provide for its balancing. In the instant proceeding the active participation of the states that operate a DNC program represents the spokes of the federal effort to establish a federal DNC program. The TRA applauds the FCC in taking the proper approach by working closely with both industry and the states to carefully identify the required goals and necessary principles to make the wheel “whole.” The states that

have established successful DNC programs have the real-world experience in operating DNC programs. Tennessee, for example, has operated a state DNC program since the year 2000 and has over 830,000 residential subscribers. The FCC recognizes this level of expertise and is working with the states in a holistic approach to establish a national DNC program that compliments not competes with existing state programs. The TRA believes that this approach will ultimately mean the process will gain momentum at a much faster pace and will roll smoothly toward the policy objective of protecting consumers from unwanted telemarketing calls at home.

II. Congressional Commitment to Federal-State Regulation of Telephone Solicitations and Telemarketing

Congress clearly envisioned federal-state regulation of telephone solicitations. The Telephone Consumer Protection Act of 1991 (47 U.S.C. §227 et seq.) (the “Act”), expressly provides that federal law regulating telephone solicitations is not intended to preempt state law that attempts to provide more protections than exist under federal law. 47 U.S.C. §227(e)(1)(D) provides in part that “. . . nothing in this section shall preempt any State law that imposes more restrictive . . . regulations on, or which prohibits . . . the making of telephone solicitations.” Furthermore, 47 U.S.C. §227(c)(5) allows consumers who have received more than one telephone call within any 12 month period by or on behalf of the same entity, to bring in an appropriate court of that state a private right of action to recover for actual monetary loss or up to \$500 in damages for each such violation. Not only did Congress recognize the proper role for both federal-state regulation of telephone solicitations but also envisioned dual federal and state DNC registries. The Act requires that a state’s registry or list or database (hereinafter, “registry”) must include that state’s part of the national registry. 47 U.S.C §227(e)(2) provides

in part that “. . . a State may not require the use of any database . . . that does not include the part of such single national database that relates to such State.” This provision requires a state that also regulates telephone solicitations, like Tennessee, to include in its separately operated state registry that state’s part of the federal registry. Tennessee law recognizes this federal statutory provision by requiring the Tennessee registry to include the state portion of federal DNC registry. Tennessee Code Annotated §65-4-405(c). Compliance with this provision requires the close coordination between the federal and state jurisdictions. It is contrary to federal law to conclude that Congress only intends for one national DNC registry to be established and that it be maintained by a federal agency.

Further, when Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act in 1994 (15 U.S.C. §6101), it is clear that its vision of both federal and state enforcement of telemarketing activities had not changed, as evidenced by the following language found at 15 U.S.C. §6102(f): “Nothing contained in this section shall prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any civil . . . statute of such State.” Again the will of Congress on this subject was expressed.

To this day Congress remains committed to a federal-state system of operation and enforcement of telemarketing activity. Further evidence of such can be found in the language in Section 4 of the Do-Not-Call Implementation Act of 2003 (Public Law 108-10; 108th Congress), requiring annual reports by the FTC and FCC on various aspects of the national program, including, “an analysis of the progress of coordinating the operation and enforcement of the DNC registry with similar registries established and maintained by the various States . . .” Why would Congress desire such a report if it intended to eliminate state DNC programs? Clearly Congress sees a role for the states in this arena.

III. Benefits of Federal-State Regulation

There are a number of practical reasons supporting federal-state regulation of telemarketing. In such an environment, there would be a greater risk to potential violators of being identified and penalized and therefore an increased likelihood of program compliance by most telemarketers with a resulting increase of protection of citizens' privacy. There would be a greater opportunity for the sharing of information among enforcement agencies regarding tactics used by program violators and therefore an enhanced ability to more quickly and effectively respond to such tactics. A federal-state system will also allow financially strapped states to prioritize and allocate limited resources to other enforcement areas knowing that such action would not leave their residents unprotected. Few would dispute the FCC's successful use of the federal-state regulatory model in curtailing telephone slamming and cramming abuses.

IV. Coordination of Operations

It would seem needlessly duplicative for there to be two separate federal registries, one operated by the FCC, and another operated by the FTC. Only one is needed. States on the other hand should be allowed to choose whether to operate a state registry and to impose more stringent consumer protections. Since a state that chooses to operate a separate registry is required to include in its registry that state's part of the national registry, the operation of the national registry should allow for the easy periodic downloading of a state's part of the national registry into the state's registry. We understand from discussions with the FTC staff that this necessary download capability will not be provided to the states. This limitation will impair federal-state cooperation and possibly prevent compliance with federal and state law. As to the

question of the continued need for separate state registries, since a state violation is based on a telephone number being registered on the state registry and since state enforcement has been based on the use of state registries for a number of years now, it only makes sense to allow states the opportunity to continue to maintain their existing registries until states independently decide to rely on only the national registry. Tennessee law would have to be amended to cease operating our state DNC registry. Only after the national registry has been operational for a sufficient period of time would it seem sensible to begin exploring the idea of operating under just one national registry and not separately operated state registries. States need sufficient time to make this determination.

V. Coordination of Enforcement

As to coordination of enforcement efforts between federal and state agencies, the TRA asserts that such should be handled mostly independently of each other as federal agencies enforce federal law and state agencies enforce state law. Any coordination of enforcement efforts between these levels should consist primarily in each providing the other with whatever assistance might be needed in either the investigative phase or in the prosecution phase of enforcement actions against alleged violators, such as the sharing of complaint data or the status of ongoing enforcement actions. This is the FCC's model of enforcement that has been successfully utilized with respect to slamming and cramming activity.

As to coordination of enforcement efforts between the FCC and FTC, at the outset the FTC should be commended for recognizing the failure of the company-specific DNC program in protecting consumers from unwanted telemarketing calls to their homes. The FTC must also be commended for adopting a national DNC program. However, the application or coverage of the

FTC's DNC program rules is much too limited and porous to be effective. For example, the FTC's DNC rules do not prohibit solicitation calls from solicitors who are not attempting to complete the sale during the solicitation call but rather are only attempting to obtain "an appointment" in order to complete the sale at a later face-to-face interview. This category of solicitors could include callers like insurance agents or termite salespersons or home siding salespersons and so forth. Many consumers vehemently object to even solicitation calls of this nature, as these are considered equally invasive of privacy. Additionally, the FTC's telemarketing rules do not apply to banks, common carriers, or entities regulated by the Securities and Exchange Commission ("SEC"). Current Tennessee law protects consumers from these types of solicitation calls. To be effective, the national program must have broad coverage with very tight and few safe harbors.

The FCC has been given broad authority by Congress to design rules ensuring that one's use of the telephone as to any type activity does not violate a citizen's right to privacy. The FTC on the other hand was given only limited authority to design its rules so as to ensure that telemarketing activity, when conducted by those over whom it has jurisdiction, is conducted in a way that does not violate a citizen's right to privacy. The FTC has designed excellent rules to protect privacy to the extent of its limited jurisdiction. The FCC's jurisdiction is not so limited and therefore its rules should complete the FTC's initiative by making clear that anyone's use of the telephone to make telemarketing calls to a citizen at home who objects to such calls and who has made his or her objection known by registering his or her home telephone number on a national or state DNC registry, violates that citizen's right to privacy and FCC rules.

Industry safe harbor provisions in the rules should be granted sparingly and cautiously. It should not be a defense that the telemarketer did not intend to complete a sale during the

telephone call, or that the rules do not apply to a particular telemarketer because the telemarketer is employed by a bank or regulated by the SEC, etc. Our experience proves that some telemarketers will search and use any legal loophole to escape having to comply with DNC regulations. Effective federal regulation of telemarketing requires that these holes be eliminated. Only the FCC can accomplish this desired result.

VI. Conclusion

The TRA urges the FCC to adopt the necessary regulations that will be effective in protecting citizens' right to privacy by working with the FTC to create one federal DNC registry that has few safe harbors for telemarketers. These federal regulations should be comprehensive in nature insuring that they will apply to all industries that engage in telemarketing. Finally, it is imperative that every step be taken to ensure that all information contained in the federal DNC registry is equally shared with states that have DNC statutes, such as the ability to download part or the entire federal registry.

Respectfully

Sara Kyle
Chairman
Tennessee Regulatory Authority